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NTSB Order No. EA-3934

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 2nd day of July, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-11599,
)	SE-11598
)	
DONALD W. CALLENDER and)	
JOHN S. WATKINS,)	
)	
Respondents.)	
)	

OPINION AND ORDER

Respondents have appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty at the close of an evidentiary hearing held in these consolidated cases on June 11, 1991.¹ In that decision, the law judge upheld the Administrator's orders suspending respondent Callender's

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

commercial pilot certificate and respondent Watkins' airline transport pilot (ATP) certificate for violations of 14 C.F.R. 91.9,² but modified the periods of suspension from the 30 days sought by the Administrator to 15 days for respondent Callender and 10 days for respondent Watkins.

The incident giving rise to these cases occurred on October 22, 1989, at John Wayne/Orange County Airport. Respondent Watkins was serving as pilot in command, and respondent Callender as co-pilot, of a Canadair CL-600. After passengers had been boarded, respondent Callender, who was operating the controls, powered up the engines and commenced taxiing. The resulting jet blast from the aircraft engines damaged a Cessna 340 which was parked in a tie-down area 80-120 feet behind the Canadair.³

On appeal, respondents do not directly challenge the law judge's findings that excessive engine thrust was used in this case, and that they both violated section 91.9. They argue, however, that the law judge lacked jurisdiction over this case

² Section 91.9 [now recodified as § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ An eyewitness to the incident, whose testimony the law judge credited, testified that the jet blast caused the Cessna 340 to gyrate and shake, and that immediately afterwards he observed that its access doors were hanging open, that it had a bent actuator rod and a left flap down/right flap up condition. (Tr. 230-2.) Respondents do not dispute that this damage was caused by the jet blast.

because the Administrator did not present sufficient proof that respondents held the airman certificates which the orders purported to suspend. They also argue that the sanctions ordered by the law judge are unduly harsh and unsupported by our precedent. In addition, respondent Callender appeals from the law judge's denial of his pre-hearing motion to dismiss the complaint, and argues that the Board lacked jurisdiction to hear his appeal because the Administrator's complaint was not timely filed. The Administrator has filed a reply brief opposing the appeals.

For the reasons discussed below, respondents' appeals are denied and the initial decision is affirmed.

1. Effect of untimely complaint. The Administrator's complaint against respondent Callender was filed eight days after Callender served his notice of appeal, and six days after the Administrator received the notice of appeal. Section 821.31(a) of the Board's Rules of Practice (49 C.F.R. 821.31(a))⁴ requires the Administrator to file his order as the complaint within five days after the notice appealing from the order has been filed

⁴ Section 821.31(a) provides as follows:

§821.31 Complaint procedure.

(a) Filing, time of filing, and service upon respondent. The order of the Administrator from which an appeal has been taken shall serve as the complaint. The complaint shall be filed by the Administrator with the Board within 5 days after the notice of appeal has been filed upon the Administrator. The complaint shall be accompanied by the Administrator's proof of service upon respondent.

upon him. This rule has been construed as directing the Administrator to file the complaint within five days of his receipt of the notice of appeal. See Administrator v. Simonton, NTSB Order No. EA-3734 at 4-5 (1992). Accordingly, the complaint against respondent Callender was filed one day late.

Contrary to respondent's position, the Administrator's late filing of his complaint did not deprive the Board of jurisdiction over respondent's appeal. As we explained in Administrator v. Brod, NTSB Order No. EA-3048 at 3-4 (1990):

The 5-day period specified in section 821.31(a) reflects the Board's judgment . . . as to the amount of time the Administrator reasonably should be allowed for filing his order with the Board once a respondent has noticed his intent to appeal a certificate action; it does not represent a statutory limitation on the Board's authority to review the validity of any such order. Consequently, while the Administrator's failure to meet the filing deadline constitutes a procedural lapse which may or may not have an adverse impact on a respondent's ability to challenge the order before the Board, the Board's authority to entertain an appeal from an order of the Administrator is in no way dependent on his compliance with our procedural rules.

Indeed, it would be both illogical and unfair to respondent if the Administrator could, in effect, prevent him from obtaining Board review of the Administrator's order by simply delaying the filing of his complaint. See also Administrator v. Kolek, 5 NTSB 1437, 1438 (1986), aff'd, Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989) (late-filed complaint did not deprive Board of jurisdiction). While a delayed complaint might, in some circumstances, prejudice a respondent's ability to defend against the charges, we find that no such prejudice resulted to

respondent Callender from the one-day delay in this case.⁵

2. Sufficiency of proof showing that respondents hold airman certificates. Respondents argue that the law judge lacked jurisdiction to hear this case because the Administrator did not properly prove that respondents held airman certificates. We hold that, under the circumstances of this case, no such proof was necessary.

In certificate actions initiated pursuant to section 609(a) of the Federal Aviation Act, as amended, only a "person whose certificate is affected" by the Administrator's order may appeal that order to the Board. 49 U.S.C. § 1429(a). Thus, when respondents invoked the Board's jurisdiction to review the Administrator's orders of suspension, they effectively admitted that they held airman certificates which were affected by those orders. We find it disingenuous and nonsensical for respondents to first seek Board review of the Administrator's orders, and then claim that the Board lacks jurisdiction to conduct that review.

In any event, we note that respondents freely admitted in their testimony at the hearing that they held a commercial

⁵ We have previously held that where there is no showing that a respondent's ability to defend against the charges has been prejudiced by a late-filed complaint, the lateness provides no grounds for dismissal of the initial decision. See Administrator v. May, 2 NTSB 2578 (1976); Administrator v. Kolek, 5 NTSB 1437 (1986); Administrator v. Brod, NTSB Order No. EA-3048 at 5 (1990). Respondent does not argue that a different standard should be applied in this case.

certificate (Callender) and an ATP certificate (Watkins), as alleged in the complaints. (Tr. 174, 192.) Accordingly, assuming any proof was necessary, we would not need to concern ourselves with respondents' hypothetical question of whether the computer-generated airman records which the Administrator submitted as proof that respondents held airman certificates, standing alone, would constitute sufficient proof on this point.⁶

Finally, we note that even if we were to dismiss the complaints against respondents for lack of jurisdiction (based on either this argument, or argument 1 above), the Administrator's orders would still possess full force and effect. See Administrator v. Brod, NTSB Order No. EA-3048 at 4.

3. Sanction. Recognizing that only limited damage was done to the Cessna 340 as a result of the jet blast in this case, the law judge modified the period of suspension of respondent Callender's certificate from 30 days, as sought in the Administrator's order, to 15 days. (Tr. 247.) Citing respondent Watkins' use of his certificate in earning his

⁶ In our judgment, to the extent that any proof at all was required, respondents' admissions were sufficient to prove that they held certificates. However, we note that in addition to the computer-generated airman records, the Administrator also presented in his case-in-chief the testimony of an FAA inspector that, in the course of his investigation, respondents admitted to him that they served as pilot in command (Watkins) and co-pilot at the controls (Callender) of the Canadair CL-600 at the time of the incident here at issue. (Tr. 70, 73.) Considering the fact that the Canadair CL-600 is certificated for two-pilot flight crews (see Tr. 228), we think that the Administrator's evidence created an inference that both respondents held airman certificates sufficient to make out a prima facie case on that point.

livelihood, and the fact that he was not operating the controls at the time of the incident, the law judge reduced the period of his suspension to 10 days.⁷ Respondents assert that these suspensions are unduly harsh and unwarranted by precedent, and that no suspension should be imposed for either respondent's violation. We disagree.

In prior cases involving section 91.9 violations based on jet blast we have ordered suspensions from zero to 30 days. See Administrator v. Neville, 3 NTSB 1478 (1978) (no suspension imposed, citing extenuating circumstance in that ramp agent did not alert airline pilot that there was a catering truck behind his aircraft);⁸ Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 11-12 (1992) (seven-day suspension for both pilot in command and flight engineer held not excessive); Administrator v.

⁷ Although the Administrator's orders sought to suspend both respondents' certificates for 30 days, counsel for the Administrator indicated in closing argument that he would be satisfied with suspensions of 15 days each. (Tr. 215.) Because the Administrator has not appealed from the law judge's sanction reductions, we express no view as to the sufficiency of the mitigating factors cited by the law judge.

⁸ Respondents' citation to Administrator v. Neville in support of elimination of any sanction in this case is not well taken. The pilot in that case, who was unaware of the existence of a catering truck behind his Boeing 727, argued that the ramp agent should have detected and informed him of the truck. Although we declined to excuse the pilot's violation on that basis, we nonetheless held that the lack of any affirmative duty on the ramp agent to inform respondent of objects behind the aircraft constituted a "deficiency in the system" which warranted the imposition of no sanction. In this case there was no comparable "deficiency," since both respondents knew that the Cessna 340 was parked behind their jet aircraft (Tr. 182, 185, 202), and thus it is immaterial that they received no additional warning.

Taylor, 3 NTSB 2583 (1980) (imposition of no sanction rejected since no extenuating circumstances shown -- 15-day suspension of ATP certificate ordered); Administrator v. Jones, 4 NTSB 620 (1982) (30-day suspension attributed to jet blast incident held reasonable where respondent did not earn his livelihood from the use of his airman certificate).

In light of the above, we hold that the 15-day (Callender) and 10-day (Watkins) suspensions of respondents' airman certificates ordered by the law judge are neither excessive nor inconsistent with precedent.⁹

⁹ We recognize that, with regard to respondent Watkins, there is little precedent to guide a sanction determination for a crewmember who was not at the controls in a jet blast incident. Indeed, Administrator v. Fay and Takacs, NTSB Order No. EA-3501, is the only case we are aware of which holds a crewmember who was not at the controls responsible for damage caused by jet blast. We do not view our conclusion in that case -- that a seven-day suspension of the flight engineer's certificate (not appealed by the Administrator) was not excessive -- as inconsistent with our determination in this case that a 10-day suspension of respondent Watkins' ATP certificate is also not excessive.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied; and
2. The 15-day suspension of respondent Callender's pilot certificate, and the 10-day suspension of respondent Watkins' pilot certificate shall commence 30 days after the service of this opinion and order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰ For the purpose of this order, respondents must physically surrender their certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).